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NO. 89-1516

IN THE

Supreme Court of the United States

October Term, 1989

JOE FRANK HARRIS, Governor of the State of Georgia, et al.,

Petitioners,

vs.

HORACE LUCKEY, et al., etc.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondents' take issue with Petitioners' statement of the case in crucial ways which bear on the issues properly before this Court. (Hereinafter Petitioners' will be referred to as "Defendants" and Respondents as "Plaintiffs.")

First, this is not an action against the "State of Georgia." See Petition (hereinafter "Pet."), 5, 6-7. Plaintiffs sued the governor and judges, the latter being responsible for oversight of the criminal judicial process, including the representation of indigents. Plaintiffs sued defendants who implement the challenged actions, and against whom remedies can be enforced.

Second, this is not an action whose "bottom line" is "an injunction expressly requiring expenditure of money." Pet. 8.

Plaintiffs were requested by the district court to specify what remedies were possible which would not violate the Eleventh Amendment. Plaintiffs filed with the court a brief listing a number of remedies the court could enforce, showing that only as a last resort would ordering of expenditure of money become an issue. Plaintiffs listed (1) a declaratory judgment setting out the violations of plaintiffs' rights with direction that defendants comply with the constitution, (2) an order adopting constitutional standards with directions that defendants comply, (3) an order directing implementation of specific remedies and (4) an injunction requiring expenditure of money.[1] While an order expressly requiring the expenditure of

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1. Plaintiffs' Brief in Response to Court's Order Reconsidering Dismissal, filed October 19, 1987.

money is within the authority of an Article III court, this litigation would never reach that stage unless defendants exhibited obstinacy beyond the remedial power of lesser sanctions. Spallone v. United States, 493 U.S. ___, 110 S.Ct. 625 (1990).

SUMMARY OF ARGUMENT

The petition does not present "special and important reasons" favoring review. Sup.Ct. Rule 10.1. The decision below is consistent with those of this Court and of other courts of appeals. In addition, there are substantial procedural reasons to deny the writ of certiorari regardless of the issues at stake. This action is not ripe for review. The decision of the court of appeals reversed the trial court's dismissal for failure to state a claim and remanded for further proceedings.

I. THIS ACTION IS NOT RIPE FOR SUPREME COURT REVIEW.

This case is not ripe for review. The court of appeals remanded to the district court. 14a. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967).

Three separate concerns make Supreme Court review premature. First, this action may yet be resolved below on factual grounds; no trial on the merits has been held. Second, the questions presented simply cannot be answered in the abstract. Only the precise remedy ultimately entered can be measured against Eleventh Amendment and comity concerns.

Third, as the district court has noted on remand, ""[t]he time for filing the answer is not entirely clear given the

various proceedings at the trial and appellate levers, but the Court notes than an answer has not been filed." Order of March 21, 1990 (appended hereto). Another month has passed and defendants still have not filed an answer. The issues defendants seek to present to this Court may be mooted by their procedural default.[2]

A. The Facts of this Action Are Not Yet Resolved.

The need for this Court's review may be obviated by development of the facts. The parties have never had a trial in which a finder of fact could explore the evidentiary bases for plaintiffs' claims. Cf. Dept. of Labor v. Triplett, ___ U.S. ___, 58 U.S.L.W. 4388 (U.S. Mar. 27,

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2. Pending before the trial court is plaintiffs' request to enter a default for defendants' failure to file their answer within 10 days of the court of appeals' mandate which was returned over three months ago.

1990). This litigation terminated at such an early stage that defendants have not yet answered plaintiffs' complaint, let alone submitted to discovery.

This appeal is from the final judgment only in the most technical of senses. The effect of the court of appeals' reversal is now to permit discovery and trial on the issues--after issue has been joined.

This case therefore carries a heavy presumption against immediate review. The writ of certiorari is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision .... And, except in extraordinary cases, the writ is not issued until final decree." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916).

B. Review of Petitioners' Issues is Premature.

This petition is premature because petitioners' questions presented will necessarily be shaped by the exact relief ultimately entered in the trial court. This is most obvious as to the suggested Eleventh Amendment and comity issues. The permissibility of the relief in the face of the Eleventh Amendment is a function of all of the following factors: (1) the substantive grounds upon which relief is entered, see, e.g., Papasan v. Allain, 478 U.S. 265, 278-82 (1986); (2) the type of remedy entered, Edelman v. Jordan, 415 U.S. 651 (1974); and (3) the identity of the addressee of relief, Ex parte Young, 209 U.S. 123 (1908). Comity concerns similarly depend upon the facts of each case. Missouri v. Jenkins, ___ U.S. ___, 58 U.S.L.W. 4480 (U.S. Apr. 18, 1990); Pulliam v. Allen, 466 U.S. 522 (1984). As

plaintiffs' discussion of the merits will show, the appropriate remedy or remedies remains an open issue. Until relief is entered, abstract discussion of remedial possibilities is an unnecessary exercise. It is also contrary to the restraint usually exercised by this Court as to such abstract questions:

> No rule of practice of this Court is better settled than "never to anticipate a question of constitutional law in advance of the necessity of deciding it."

Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 71-72 (1961)(citations omitted).

Defendants present "a variety of hypothetical controversies which may never become real. [This Court is being] invited to enter into a speculative inquiry for the purpose of condemning [remedy] provisions the effect of which in concrete situations, not yet developed,

cannot now be definitely perceived. [This Court should] decline that invitation." Electric Bond & Share Co. v. SEC, 303 U.S. 419, 443 (1938).

II. THIS ACTION RAISES NO "SPECIAL AND IMPORTANT' ISSUES.

The petition does not demonstrate grounds for issuance of a writ of certiorari. Review ordinarily is granted only in the circumstances specified in Rule 10.1: (1) "conflict with the decision of another United States court of appeals on the same matter," (2) decision on "an important question of federal law which has not been, but should be settled by this Court" or (3) "conflict with the applicable decisions of this Court." None of these grounds is satisfied here.

A. The Remedial Authority Issues Are Premature at Best.

Defendants ask this Court to assume in advance the type of remedy the district

court might choose. Any assumption about appropriate relief is speculative. Equity is a flexible tool, and the equitable decree above all is to be molded to fit the particulars of a given case. See, e.g., Spallone v. United States, 493 U.S. ___, 110 S.Ct. 625 (1990); Hutto v. Finney, 437 U.S. 678 (1978).

Defendants ask this Court to assume in advance not only that they will be willful violators of any simple decree, but also that the district court will violate the strictures of comity and the Eleventh Amendment. Given the recent opinions of this Court in Spallone and Missouri v. Jenkins, it is unlikely that any initial order of relief will stretch the limits of comity and the Eleventh Amendment. Such assumption is highly speculative and unfair to the trial judge. That court should have the

opportunity in the first instance to compare all possible relief against limitations on that relief.

> [The defendant's] position, we think, underestimates the ability of a federal court to formulate a decree that will grant the respondents the constitutional relief to which they may be entitled without oversteppinmg the limits of judicial power.

Hills v. Gautreaux, 425 U.S. 284, 301 (1976). Plaintiffs have proposed a range of conceivable relief. See Statement of The Case, supra. This Court's review of remedial issues would be premature.

B. The Eleventh Amendment Permits All Relief Necessary.

The Fourteenth Amendment permits the federal courts remedial powers against the states in matters of future compliance with the federal constitution. Ex parte Young, 209 U.S. 123 (1908). The Ex parte Young fiction permits a federal plaintiff to sue a state official, and thereby avoid

the immunity of the state, for purposes of enforcing federal rights. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984).

Directly contrary to defendants' claims, the Eleventh Amendment is no bar to a decree requiring the expenditure of money, so long as that decree is entered for the purpose of securing future compliance with constitutional mandates. Missouri v. Jenkins, supra; Milliken v. Bradley, 433 U.S. 267 (1977)(states required to participate in remedying racial segregation of local schools).

Defendants seem to have three objections to injunctive relief. The first is that, effectively, relief would run against the state. That was also the issue in Milliken v. Bradley, Missouri v. Jenkins and Ex parte Young, however. Defendants' argument is nothing less than

an attack on well settled principles of long standing.

Defendants' second objection appears to be formal. Defendants' apparently prefer an order against the state, if any ordered is to be entered. But the Ex parte Young fiction demands indirect suit against state officers. Moreover, this Court has expressed its impatience with hypertechnical matters of form in Eleventh Amendment fiction issues. Hutto v. Finney, 437 U.S. at 692.

Finally, defendants object that the governor should not be a defendant because he has no personal stake in this controversy. The entire argument misconceives Ex parte Young. The point of suing the governor is not to establish personal responsibility, but rather to bring in an Ex parte Young surrogate for the state. The governor's personal role is quite

irrelevant. Under Ex parte Young, the defendant need only, "by virtue of his office, ha[ve] some connection" with the statute or conduct under scrutiny. ""[W]hether [this connection] arises out of general law, or is specially created by the act itself, is not material so long as it exists." 209 U.S. at 157.[3]

The governor is a proper defendant, and is subject to suit as a representative

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3. Despite defendants' protestations, the court of appeals found as a matter of state law that the governor has overall responsibility for law enforcement and for criminal prosecutions. 8a. See, Papasan v. Allain, 487 U.S. 265, 282, n. 14 (1986)("general supervision"). Moreover, the governor is a suitable defendant where the state has defaulted in its constitutional duty. See Wallace v. Jaffree, 466 U.S 924 (1984)(governor among others); Milliken v. Bradley, supra (same); Fortson v.Dorsey, 379 U.S. 433 (1965)(secretary of state); Reynolds v. Sims, 377 U.S. 533 (1964)(same); Williams v. Wallace, 240 F.Supp. 100, 110 (M.D.Ala. 1965) (governor).

of the state despite the Eleventh Amendment.

C. Injunctive Relief May Be Entered Against State Judges.

Defendants argue that federal injunctive relief against state court judges is inherently so disruptive as to be beyond the pale. This Court has already rejected that very proposition for purposes of the absolute immunity doctrine. "We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." Pulliam v. Allen, 466 U.S. 522, 541-42 (1984). Defendants appear to disclaim the Eleventh Amendment as a bar to relief against judges, and to rely instead upon general notions of comity and federalism. But the decisions they cite lend no support to the general proposition that prospective relief is barred. Younger

v. Harris, 401 U.S. 37 (1971), holds that the federal courts ordinarily are barred from restraining ongoing state prosecutions, regardless of whether a judge or someone else is restrained. Younger does not forbid prospective injunctions to guarantee criminal process rights where no prosecution is restrained. Gerstein v. Pugh, 420 U.S. 103, 108, n. 9 (1974).

O'Shea v. Littleton, 414 U.S. 488 (1974) is likewise inapplicable here. As this Court noted in O'Shea:

> Apparently the order would contemplate interruption of state proceedings to adjudicate assertions of noncompliance by petitioners... A federal court should not intervene to establish the basis for future intervention that would be so intrusive and unworkable.

Id. at 500. Plaintiffs do not request an order either aimed at interruption of individual prosecutions. Furthermore the very existence of the O'Shea decision

assures that the district court would not enter such an order. Any possible relief here is like that in Gerstein v. Pugh, where "[t]he injunction was not directed at the state prosecutions as such, but only at [constitutionally required protections]...that could not be raised in defense of the criminal prosecution. The order...could not prejudice the conduct of the trial on the merits." 414 U.S. at 108, n. 9.

Defendants fall short of assigning conflict in circuits as a reason for granting the writ, but do argue there is a conflict and mention three cases. Pet. 19, 20. Tarter v. Hury, 646 F.2d 1010 (5th Cir. Unit A 1981) and Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974), present no conflict for the simple reason that they are opinions of the same circuit that decided the instant case. The Fifth

Circuit became the Fifth and Eleventh Circuit when the administrative units split in late 1981. Decisions of the former Fifth Circuit are treated as precedent even now in the Eleventh Circuit.[4] The court of appeals' refusal to consider this case en banc signals clearly the lack of significant internal conflict among these three opinions. Even without such a signal, this Court ordinarily does not grant certiorari to resolve intracircuit conflicts. See Davis v. United States, 417 U.S. 333, 340 (1974).

The only case defendants cite from

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4. The Eleventh Circuit's boilerplate footnote when citing a former Fifth Circuit case is: "This [Fifth Circuit] case was decided prior to the close of business on September 30, 1981, and is binding precedent under Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981)." DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1507 n. 9 (11th Cir. 1989).

another circuit is Wallace v. Kern, 499 F.2d 1345 (2nd Cir. 1974). Despite defendants' general assertion that Wallace conflicts with the decision below, it conflicts in dicta only. And whatever that case suggests about federal court challenges to state criminal practices, it does not support defendants' contention that federal courts cannot enforce orders to correct constitutional violations by state judicial systems. The subsequently decided cases of Gerstein v. Pugh, 420 U.S. 103 (1975) and Pulliam v. Allen, 466 U.S. 522 (1984) belie such claim.

In short, an appropriate injunction may be entered against the defendant judges consistent with comity and Eleventh Amendment concerns.

D. Injunctive Relief May Enforce Sixth Amendment Rights.

Defendants present the question "[w]hether respondents have presented a

viable and justiciable claim for injunctive relief to prevent anticipated future Sixth Amendment...violations." Questions Presented, Pet. i. Plaintiffs have presented just such a claim.[5]

Gerstein v. Pugh, 420 U.S. 103 (1974), approved use of the injunction as a remedy to prevent future violation of procedural rights in the criminal process. The concurring opinion summed up the result of the Gerstein decision:

> Because Florida does not provide all defendants in custody pending trial with a fair and reliable determination of probable cause for their detention, the respondents and the members of the class they represent are entitled to declaratory and injunctive relief.

Id. at 126.

Gerstein is but an application of

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5. Also pending below are Eighth Amendment and equal protection claims which neither the district court nor the court of appeals addressed. 10a, n.1.

age-old equitable principles. Preventive injunctions are designed to avoid threatened harm before it occurs. Swift & Co. v. United States, 272 U.S. 311, 326 (1928); Vicksburg Waterworks Co. v. Vicksburg, 184 U.S. 65, 82 (1902). An injunctive plaintiff bears the usual burdens to show "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." O'Shea v. Littleton, 414 U.S. 488 (1974).

Defendants invite this Court to hold that even if an injunctive plaintiff can meet these ordinary standards for issuance of the chancellor's decree, he or she is nonetheless not entitled to the ordinary relief. Defendants cite Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984) as supporting that proposition. Neither

Strickland nor Cronic, however, is inconsistent with the relief plaintiffs seek below.

Defendants purport to find in these decisions a general rule that "judicial determinations can only be made on a case-by-case basis in the context of a specific legal proceeding or trial." Pet. 22. In so arguing, defendants confuse issues of relief and issues of substance.

What Strickland and Cronic hold is that a particular remedy, namely post-conviction relief, is unavailable unless a given criminal defendant makes an individualized showing. Strickland makes clear several times that the Court was concerned there only with post-conviction relief. 466 U.S. at 671, 684, 687, 691.

Plaintiffs seek not reversal but prevention. Traditionally, that distinction is crucial in deciding not only

appropriate relief but also appropriate tests for judging relief. The values of repose almost always require a higher showing for reversing completed action, especially completed judicial action, than for preventing harm before hand. Compare Reynolds v. Sims, 377 U.S. 533, 561-52 (1964) and Nixon v. Herndon, 273 U.S. 536 (1927)(prospective relief to prevent racially discriminatory elections), with Toney v. White, 488 F.2d 310, 314 (5th Cir. 1973)(en banc)(decree setting aside election normally requires possible outcome difference); compare United States v. Balistrieri, 779 F.2d 1191, 1204-05 (7th Cir. 1985)(appellate mandamus available to assure appearance of impartial trial), with United States v. Murphy, 768 F.2d 1518, 1539-41 (7th Cir. 1985)(no post-conviction review for mere appearance of judge's partiality); but cf. Peralta v.

Heights Med. Ctr., 485 U.S. 80 (1988) (failure of due process notice requires setting aside civil judgment, even without showing of possible outcome effect).

Indeed, defendants appear to concede that some Sixth Amendment violations are subject to anticipatory relief. Pet. 21. They argue only about which ones are amenable to such relief. They somehow argue that injunctive relief is appropriate only for per se violations, that is, for cases of either declared state policy or complete abdication of duty. This argument also flies in the face of Gerstein v. Pugh, supra, which permitted relief although unconstitutional trial procedures were merely likely, not mandated or universal.[6]

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6. In Gerstein, after amendment of the originally-challenged procedures, "a defendant charged by information still

More generally, a court may tailor its decree to contemplate subtleties of substance and relief, including "the nature and extent of the constitutional violation," Milliken v. Bradley, 418 U.S. 717, 744 (1974)(emphasis added), Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15-16 (1978), to take account of such complexity that violation and remedial response are inherently intertwined, Hutto v. Finney, 427 U.S. 678, 685-86 (1978), or to respond to circumstances which by their nature call for incremental response, id. at 687. There is no basis for the argument that injunctions are designed only for wrongs so clear that no one could mistake them.

In summary, the petition shows no "special and important" reason for this

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could be detained pending trial without a judicial determination of probable cause." 420 U.S. at 109 (emphasis added).

Court's grant of certiorari. Defendants show no conflict between the result below and decisions of this Court or conflict with decisions of other courts of appeals. Finally, defendants present no important question of law which should be settled by this Court.

CONCLUSION

Because certiorari is premature, because the facts do not support review of the questions pressed by defendants, and because defendants have not demonstrated the existence of any of the three possible grounds for certiorari, the writ should be denied.

Respectfully submitted,

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NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action No.
4:86-cv-297-HLM

Filed March 21, 1990

HORACE LUCKEY, III, et al.,

Plaintiffs,

vs.

JOE FRANK HARRIS, Governor, et al.,

Defendants.

ORDER

Defendants move the Court to stay the proceedings pending the disposition of their petition for certiorari by the Supreme Court. Defendants maintain that good cause exists to grant the stay, in large part because the Court of Appeals' denial of en banc consideration of its reversal of this Court's dismissal of the action drew an extensive and heated dissent from four of the Eleventh Circuit judges.

Plaintiffs oppose the entry of a stay on both procedural and substantive grounds. Procedurally, Plaintiffs contend that this Court lacks authority to stay the appellate court's decision, and point out that the Eleventh Circuit has aleady denied Defendants' motion for a stay pending Supreme Court review of the case. Substantively, Plaintiffs argue that a stay is not warranted because Defendants have not shown either a likelihood of success on the merits of their certiorari petition or that they would be irreparably harmed if the case proceeds.

Given the potential magnitude of this unique case, the Court believes that the Eleventh Circuit should have stayed its mandate. Nevertheless, Plaintiffs are absolutely correct that such a stay can be obtained from the Eleventh Circuit or the

Supreme Court only. 28 U.S.C. § 2101(f); Sup.Ct.R. 44.2; Fed.R.App.P. 41(b); In re Stumes, 681 F.2d 524, 525 (8th Cir. 1982).

ACCORDINGLY, Defendants' motion to stay all proceedings pending is DENIED.[1]

IT IS SO ORDERED, this 21st day of March, 1990.

s/Harold L. Murphy

United States District Judge

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1. Plaintiffs have written the Clerk of this Court, requesting that default be entered due to Defendants' failure to file an answer. The time for filing the answer is not entirely clear given the various proceedings at the trial and appellate levels, but the Court notes that an answer has not yet been filed.